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CLERK U.S. DISTRICT COURT DISTRICT OF NEVADA	
BY	DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

KENNETH TOBIN,  
  
Plaintiff,  
  
vs  
  
GRANITE GAMING GROUP II, LLC,  
a Nevada limited liability company  
d/b/a GIRLS OF GLITTER GULCH,  
  
Defendant

Case No. 2:07-cv-00577-BES-PAL

**REPORT OF FINDINGS  
REGARDING PLAINTIFF'S  
COUNSEL'S RESPONSE TO  
ORDER TO SHOW CAUSE AND  
RECOMMENDATION OF  
DISMISSAL WITH PREJUDICE**

This matter is before the court regarding an Order to Show Cause issued to Charmaine L Clark, Counsel for Plaintiff Kenneth Tobin, dated November 16, 2007. A Show Cause Hearing was held before Magistrate Judge Peggy A. Leen on February 6, 2008 at 2:00 p.m. Timothy W. Roehrs appeared on behalf of the Defendant. Neither Plaintiff nor Plaintiff's counsel appeared. Defendant moved for dispositive sanctions. The Court ruled that case dispositive sanctions were appropriate, directing Defendant to submit proposed Findings of Fact and Conclusions of Law recommending dismissal of this matter due to the Plaintiff's counsel's repeated failures to comply with Court orders, failure to comply with discovery obligations, failures to comply with the Federal Rules of Civil Procedure and the Local Rules of Practice, and failures to appear at multiple Court ordered proceedings.

Based on the Findings of Fact and Conclusions of Law below, it is hereby recommended that the District Judge impose case dispositive sanctions and dismiss this matter with prejudice

**I. FINDINGS OF FACT.**

Plaintiff initiated this action on May 2, 2007 Docket No. 1 Granite Gaming II answered the Complaint on June 18, 2007 Docket No. 8 The parties, via Plaintiff's counsel, Charmaine L. Clark, and Defendant's counsel, Timothy W. Roehrs, conducted the Rule 26(f) conference on June 28, 2007 Both parties agreed that the standard one hundred eighty (180) day discovery period and deadlines contemplated by Local Rule 26.1 was sufficient for this matter Defendant's counsel advised that he would be forwarding to Plaintiff's counsel a proposed Stipulated Protective Order to govern the confidentiality of certain non party personnel documents that would be produced during discovery, a copy of which was sent to Plaintiff's counsel on July 12, 2007 Defendant's counsel agreed to prepare the Stipulated Discovery Plan and Scheduling Order which was due to the Court by no later than July 12, 2007, pursuant to LR 26.1

On June 28, 2007, Defendant's counsel forwarded a draft Stipulated Discovery Plan and Scheduling Order to Plaintiff's counsel for review Plaintiff's counsel did not respond Thereafter, Defendant's counsel repeatedly attempted to contact Plaintiff's counsel, via telephone and correspondence, regarding the proposed Stipulated Discovery Plan and Scheduling Order, specifically on July 2, 19, 24, 30, and August 2, 9, 2007 Plaintiff's counsel made no response to these telephone calls and letters As such, on August 14, 2007, Defendant filed a Motion to Impose Discovery Plan and Scheduling Order Docket No. 14 and Exhibit A, B, and D thereto

1 The Court scheduled a hearing on the motion for August 28, 2007 Docket No. 15  
2 Counsel for Defendant appeared at the time of the hearing, counsel for Plaintiff did not appear or  
3 arrange to appear telephonically as instructed by the Court's Notice of Hearing. The courtroom  
4 administrator was unable to reach Plaintiff's counsel by phone prior to the hearing. Docket  
5 No. 16. The Court granted Defendant's motion and entered a Scheduling Order, setting, *inter*  
6 *alia*, a December 17, 2007 deadline for the completion of discovery. Docket No. 17

7  
8 On August 2, 2007, Defendant served its First Set of Interrogatories and First Set of  
9 Requests for Production of Documents. Tanya Y. Parker of Plaintiff's counsel's office signed  
10 receipts of copy for each discovery request. Docket No. 30 and Exhibits 3-4 thereto. Pursuant to  
11 Fed. R. Civ. P. 33(b)(3) and 34(b), Plaintiff's responses to these requests were due by  
12 September 4, 2007.

13 Plaintiff did not serve Defendant with responses to its discovery requests by the  
14 September 4, 2007 deadline, nor was Defendant's counsel otherwise contacted by Plaintiff's  
15 counsel regarding the pending discovery requests. Docket No. 19, at Exhibit 7. At that juncture,  
16 Defendant's counsel had also been unable to secure any response from counsel for Plaintiff  
17 regarding the previously proposed Stipulated Protective Order, despite repeated attempts to  
18 contact her as set forth above. See *supra* at 2, Docket No. 18, at Exhibit 2.

19 Between September 13 and September 21, 2007, Defendant's counsel telephoned and  
20 wrote to Plaintiff's counsel twice regarding the overdue discovery responses and the proposed  
21 Stipulated Protective Order. Docket No. 18, Exhibits 2, 9-10, Docket No. 19, Exhibit 7-9. In a  
22 September 21, 2007 letter to Plaintiff's counsel, Defendant's counsel stated that relief from the  
23 Court would be sought if she did not respond to these inquiries by October 4, 2007. *E.g.*, Docket  
24 No. 19, at Exhibit 9.

When Plaintiff's counsel again did not respond to Defendant's correspondence, Defendant filed two motions on October 5, 2007 a Motion to Compel Answers to Defendant's First Set of Interrogatories and First Set of Requests for Production of Documents and Motion for Sanctions Pursuant to Fed. R. Civ. P. 37, and a Motion for a Protective Order Governing Confidential Information Produced During Discovery Docket Nos. 18-19. The Court scheduled a hearing on such motions for November 13, 2007 Docket No. 20.

On October 11, 2007 Defendant proposed to Plaintiff a draft Joint Interim Status Report pursuant to the parties' obligation under LR 26-3 and the Discovery Plan and Scheduling Order to file such a report by October 18. The Proposed Joint Interim Status Report specifically stated "On October 5, 2007, Defendant filed a Motion to Compel Plaintiff to answer Defendant's First Set of Interrogatories and First Set of Requests for Production of Documents." Docket No. 30, at Exhibit 5. Despite attempts to contact Plaintiff's counsel regarding the proposed Joint Interim Status Report on October 15 and 17, counsel was unable to secure any response. Consequently, Defendant unilaterally filed the Interim Status Report on October 19, 2007 Docket No. 21.

Plaintiff failed to file any response or opposition to Defendant's Motion to Compel and for Sanctions or its Motion for a Protective Order Docket No(s) 22-23. At the November 13, 2007 hearing, Timothy W. Roehrs appeared on behalf of the Defendant. Plaintiff failed to make an appearance, notwithstanding the Court waiting more than fifteen minutes after the time set for the hearing and attempts by the courtroom administrator to contact Plaintiff's counsel's office. Counsel for the Plaintiff had failed to contact the Court or Defendant's counsel prior to the hearing to indicate any reason why she would be unable to attend this hearing.

The Court granted Defendant's Motion for a Protective Order, Motion to Compel and Motion for Sanctions in an Order dated November 16, 2007. The Court's Order directed Plaintiff to fully and completely respond to Defendant's discovery requests, without objections, no later than November 27, 2007. The Court also awarded Defendant sanctions of attorney's fees and costs in the amount of \$2,000.00.

1 The Court further issued an Order to Show Cause directing counsel for Plaintiff to show  
2 cause, in writing why sanctions should not be imposed for her failure to comply with the Local  
3 Rules of Practice, this Court's orders, and attend hearings on motions this Court had set. A  
4 status hearing was set for December 11, 2007, at 10:00 a.m., the purpose of which was to hear  
5 from counsel for Plaintiff on the response to the Order to Show Cause, hear any disputes the  
6 Defendant had with respect to the adequacy of Plaintiff's answers to the Interrogatories and  
7 Requests for Production of Documents, and consider any requests for adjustments to the Court's  
8 discovery plan and scheduling order. Docket No. 25 (citing LR 1A 4.1 which allows sanctions  
9 for failure to appear for "argument on motion" or "for a presentation to the court," or for failure  
10 to "comply with these rules" or "comply with any order of this court.") The Court specifically  
11 provided that the failure to timely comply with the provisions of the Order could result in the  
12 imposition of sanctions up to and including dismissal of this matter.

13 Plaintiff did not serve the written discovery by November 27, 2007 as ordered by this  
14 Court. Docket No. 30. Plaintiff's counsel also did not file a response to the Court's Order to  
15 Show Cause by November 27, 2007.

16 On November 28, 2007, counsel for Plaintiff filed an affidavit, unsupported by any  
17 additional documentary evidence, wherein she asserted that she did not "appear at the previous  
18 hearings in this matter nor file responsive briefing to the Motions to Compel or for Protective  
19 Order" because she did not have notice of the motions or the hearing dates. Docket No. 27, at  
20 ¶¶ 1-2. Plaintiff's counsel contended that the Court's notices in this matter had been delivered to  
21 her "bulk" e-mail folder, the folder where "spam" messages are directed, resulting in them being  
22 deleted after 14 days. Id. at ¶ 3. Although she admitted that the same problem occurred in 2006  
23 for several other federal cases in which she was involved, she stated that after she complained to  
24 Yahoo, she had assumed the problem was fixed. Plaintiff's counsel contended that she became  
25 aware of the issue at hand on November 28 when opposing counsel in a different case called her  
26 because she was supposed to be present for a telephonic status conference, causing her to check  
27 her bulk e-mail account. Id. at ¶¶ 3-4. Plaintiff's counsel's response went on to assert that had  
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1 she opposed Defendant's Motions, she would have stated that she "left a telephone message with  
2 Defendant's counsel indicating that [she] had no record in [her] office of receiving the discovery  
3 and that [she] was not inclined to agree to the protective order[ ]" Id. at ¶ 5

4 On December 7, 2007, Defendant responded to Plaintiff's counsel's affidavit arguing that  
5 her untimely explanations did not justify her failures to comply with the Local Rules of Practice  
6 or the Court's Orders, or her failures to attend hearings and communicate with Defendant's  
7 counsel. Docket No. 30. Defendant demonstrated that Plaintiff's counsel had received its  
8 written discovery requests and that no message regarding the same had been left with its counsel.  
9 Defendant explained that given Plaintiff's counsel's representation that she had not received  
10 Defendant's written discovery requests, it had forwarded additional copies of the written  
11 discovery to Plaintiff on December 3, 2007. Id. at Exhibits 3, 4, 7. Defendant suggested that  
12 additional sanctions were warranted as the Court deemed proper.

13 Defendant attended the December 11, 2007 status hearing via its counsel, Plaintiff's  
14 counsel failed to appear without prior notice to the Court or Defendant. The courtroom  
15 administrator was able to reach Plaintiff's counsel by phone at which time Plaintiff's counsel  
16 requested an emergency continuance due to a personal emergency involving the health of her  
17 mother. The Court continued the hearing to December 19, 2007, at 3:00 p.m., based upon  
18 Plaintiff's counsel's representation of her availability on that date. Docket No. 31.

19 At the December 19, 2007 hearing, Defendant made an appearance. Plaintiff did not  
20. After the commencement of the hearing, the Court acknowledged receiving a voicemail message  
21 from Plaintiff's counsel prior to the hearing indicating that she would be unavailable to appear  
22 due to the same personal emergency discussed on December 11. After conferring with counsel  
23 with Defendant, this Court stayed the matter for 30 days in order to give Plaintiff's counsel  
24 sufficient time to attend to her mother's health. The Court directed Defendant's counsel to  
25 contact Plaintiff's counsel to obtain a day and time upon which both were available to continue  
26 this matter. Docket No. 32.

27 On December 20, 2007, Defendant's counsel notified Plaintiff's counsel of the Court's  
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December 19 Order and requested dates and times upon which she was available for the continued status hearing Docket No. 34 at Exhibits 25, 27. Defendant's counsel also inquired as to the status of the Plaintiff's discovery responses which still had not been received. Id. Defendant's counsel attempted to discuss this matter with Plaintiff's counsel again on December 28, January 1, 10, and 15, via telephone calls and letters. Defendant's counsel received no response until January 16, 2008, when Plaintiff's counsel's assistant telephoned and provided the available dates of February 6<sup>th</sup> - 8<sup>th</sup> for the continued status hearing. Id. at Exhibits 25, 27, 31. Defendant's counsel provided these dates to the Court and a hearing for February 6, 2008 at 2:00 p.m. was set. Docket No. 33. Defendant's counsel notified Plaintiff's counsel of the date and time of the continued hearing. Docket No. 34 at Exhibit 31.

On January 23, 2008, Plaintiff's counsel's assistant notified Defendant's counsel that Plaintiff's discovery responses would be served on January 28, 2008. Defendant did not receive such responses on January 28, and Plaintiff's counsel made no contact with Defendant's counsel regarding the same. Docket No. 34, at Exhibit 25. On January 29, 2008, Defendant filed a Motion to Dismiss this case pursuant to Fed. R. Civ. P. 41(b) and 37(b)(2)(A)(v). Docket No. 34.

On February 6, 2008, at 2:00 p.m. this Court convened for the continued status hearing on the Order to Show Cause. Defendant appeared at the hearing. Counsel for Plaintiff did not appear. Instead, at approximately 12:30 p.m. counsel for Plaintiff had contacted the courtroom administrator indicating that she was unable to attend the hearing because her mother was being released from a care facility and she needed to pick her up and take her home. Plaintiff's counsel further indicated that she was unable to leave her mother alone once arriving at her home.

Defendant requested dismissal of this matter, arguing that Plaintiff's counsel's recent trouble with her mother's health failed to excuse her prior lack of diligence in and absence from this matter. Defendant argued that Plaintiff's counsel's November Response to the Order to Show Cause (which preceded the recent personal issues she purported to face) failed to justify her repeated failures to follow Court Rules and Orders, appear at hearings scheduled by the

1 Court, and her complete failure to communicate with Defendant's counsel

2 Defendant explained that Plaintiff's counsel's assertion that she had not received  
3 Defendant's discovery was simply untrue given the signed receipt of copy and runner's slip  
4 Defendant produced proving such documents were hand delivered to Plaintiff's counsel on  
5 August 2, 2007 Defendant's counsel stated that another copy of such discovery responses had  
6 been sent to Plaintiff's counsel on December 3, and informed the Court that Plaintiff had still  
7 failed to respond to the discovery despite Plaintiff's counsel's representation that they would be  
8 served on January 28, 2008

9 Defendant argued that Plaintiff's counsel's assertion that her e mail system was to blame  
10 for her failure to respond to motions and attend hearings was unavailing to excuse her lack of  
11 diligence in this matter and violation of Court Orders and Rules Defendant additionally pointed  
12 out that even if such an excuse was acceptable, Plaintiff's counsel was on notice of Defendant's  
13 motions given its correspondence to Plaintiff's counsel both prior to and after the filing of the  
14 October 5, 2007 motions. Indeed, Defendant stated that the proposed Joint Interim Status Report  
15 sent to Plaintiff's counsel on October 11 specifically stated that two motions had been filed with  
16 the Court

17 Finally, Defendant detailed for the Court the near complete lack of communication its  
18 counsel had received from Plaintiff's counsel during the pendency of this case Other than two  
19 recent telephone calls from her assistant (regarding the setting of the February 6, 2008 hearing  
20 and the overdue discovery purportedly to be served on January 28, 2008) and two letters from  
21 Plaintiff's counsel regarding unrelated matters, Defendant's counsel had received no responsive  
22 communication from Plaintiff's counsel since the June 28, 2007 Rule 26(f) Conference

23 The Court agrees with Defendant's position and further finds that Plaintiff's recent  
24 personal matters, regarding her mother's health, are simply not credible excuses for her  
25 continued failures to follow this Court's Orders and attend hearings in this matter Plaintiff's  
26 counsel has failed to provide this Court with any information or documentation to substantiate  
27 her contentions regarding her mother's health On two occasions, this Court has rescheduled the  
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1 status hearing to a time when Plaintiff's counsel represented she was available, yet each time, the  
2 Court has received last minute messages from Plaintiff's counsel stating that she would not be  
3 able to attend. Such conduct in response to an Order to Show Cause from this Court is simply  
4 inexcusable and clearly demonstrates that the long history of dilatory conduct in this matter will  
5 continue without regard to Defendant's, or even the Court's, actions.

## 6 **II. CONCLUSIONS OF LAW.**

7 The United States Supreme Court has recognized that "[t]he authority of a federal trial  
8 court to dismiss a plaintiff's action with prejudice because of his failure to prosecute is  
9 necessary in order to prevent undue delays in the disposition of pending cases and to avoid  
10 congestion in the calendars of the District Courts." *Link v. Wabash R. Co.*, 370 U.S. 626, 629  
11 30 (1962). That Court held that "when circumstances make such action appropriate, a District  
12 Court may dismiss a complaint for failure to prosecute even without affording notice of its  
13 intention to do so or providing an adversary hearing before acting." *Id.* at 633. To that end,  
14 Federal Rule 37 provides, in relevant part, as follows:

### 15 *(b) Failure to Comply with a Court Order*

#### 16 17 *(2) Sanctions in the District Where the Action Is Pending*

18 *(A) For Not Obeying a Discovery Order.* If a party fails to obey an order to  
19 provide or permit discovery, including an order under Rule 37(a), the court  
20 where the action is pending may issue further just orders. They may include the  
21 following:

22 (i) directing that the matters embraced in the order or other designated  
23 facts be taken as established for purposes of the action, as the prevailing party  
24 claims,

25 (ii) prohibiting the disobedient party from supporting or opposing  
26 designated claims or defenses, or from introducing designated matters in  
27 evidence,

28 (iii) striking pleadings in whole or in part,

(iv) staying further proceedings until the order is obeyed,

- (v) dismissing the action or proceeding in whole or in part,
- (vi) rendering a default judgment against the disobedient party, or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination

(C) *Payment of Expenses* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust

Fed Civ P 37(b)(2)(A) Moreover, Federal Rule 41(b) provides

(b) *Involuntary Dismissal, Effect* If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule operates as adjudication upon the merits

Finally, the Local Rules of Practice provide that the Court may, after notice and opportunity to be heard, impose any and all appropriate sanctions on an attorney or party who, without just cause, fails to appear for a presentation to the Court, fails to comply with the Local Rules, and/or fails to comply with any order of this Court LR IA 4.1

Counsel for the Plaintiff has repeatedly failed to comply with Court orders, discovery obligations, the Federal Rules of Civil Procedure, and the Local Rules of Practice, and appear at multiple Court ordered proceedings, without just cause As such, this matter should be dismissed with prejudice pursuant to Rule 37(b)(2)(A), 41(b) and Local Rule IA 4.1

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1           A.     **Counsel for Plaintiff Has Repeatedly Failed to Comply with Court Orders,**  
2               **the Federal Rules of Civil Procedure, the Local Rules of Practice, Has Failed**  
3               **to Appear at Multiple Court Ordered Proceedings, and Has Failed to**  
4               **Communicate with Defendant's Counsel.**

5           First, Plaintiff's counsel completely ignored her obligation to work with Defendant's  
6           counsel to agree upon and file a proposed Discovery Plan and Scheduling Order Fed R Civ P  
7           26(f), LR 26 1(d) While Defendant's counsel prepared and proposed a stipulated Discovery  
8           Plan and Scheduling Order in accordance with the parties' agreement at the Rule 26(f)  
9           Conference, counsel for Plaintiff never responded to the proposed plan, ignoring multiple  
10          attempts by Defendant's counsel to obtain a response, and preventing the parties from filing the  
11          plan by the LR 26 1 deadline As a result, the Court was forced to impose a Discovery Plan and  
12          Scheduling Order, upon Defendant's Motion, after holding a telephonic hearing which Plaintiff's  
13          counsel failed to attend Docket No(s) 15 17 At no time has Plaintiff's counsel provided any  
14          justification to this Court for her failure to follow LR 26 1 and Fed R Civ P 26(f)

15          Second, the Rules require that a party upon whom interrogatories and requests for  
16          production of documents have been served must serve a copy of the answers, and objections, if  
17          any, within 30 days after the service of the discovery requests Fed R Civ P 33(b)(3), 34(b)  
18          Here, Plaintiff was served with Defendant's First Set of Interrogatories and First Set of Requests  
19          for Production of Documents on August 2, 2007 Docket No 30, at Exhibit 3 Plaintiff did not  
20          serve his responses upon Defendant by the September 4, 2007 deadline, nor did Plaintiff's  
21          counsel otherwise contact counsel for Defendant for an extension Docket No 19 and Exhibit 7  
22          thereto Plaintiff's counsel ignored every attempt by Defendant's counsel to inquire as to the  
23          overdue discovery requests until January 23, 2008 when it was assured to Defendant that  
24          responses would be served by January 28, 2008 Docket No 34 and Exhibit 25 thereto Despite  
25          that representation, no discovery responses have been served upon Defendant and Plaintiff's  
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discovery responses are now six (6) months overdue. As such, Plaintiff and his counsel have failed to follow Fed. R. Civ. P. 33(b)(3) and 34(b). The Court rejects Plaintiff's counsel's contention that such responses were never received, given the receipts executed by her staff and her failure to rebut Defendant's evidence regarding the same. Docket 30, Exhibit 3.

Third, Local Rule 7.2 requires a party to file points and authorities in response to all motions filed unless otherwise ordered by the Court. On October 5, 2007, Defendant filed a Motion to Compel and Motion for Sanctions and a Motion for a Protective Order. Docket Nos. 18, 19. Plaintiff filed no responsive points and authorities to these motions. Docket No(s) 22, 23.

Fourth, the parties were obligated, pursuant to the Discovery Plan and Scheduling Order and Local Rule 26.3, to file an Interim Status Report by October 18, 2007. LR 26.3, Docket No. 17. Plaintiff's counsel ignored her obligations under this Rule and failed to make any response to Defendant's draft Joint Interim Status Report forwarded to her on October 11, 2007, or subsequent attempts to communicate with her about the same. Docket No. 30, at Exhibits 4, 6. As such, while Defendant filed its own Interim Status Report on October 19, 2007, Docket No. 21, Plaintiff has never filed such a report.

Fifth, the Court scheduled a hearing for November 13, 2007 on Defendant's Motion to Compel and Motion for Protective Order. Plaintiff's counsel failed to appear.

Sixth, as a result of that hearing and Plaintiff's counsel's dilatory conduct, this Court, on November 16, granted Defendant's motions and ordered Plaintiff to fully and completely respond to Defendant's discovery requests without objections no later than November 27, 2007. This Court further ordered counsel for Plaintiff to show cause, no later than November 27, 2007, why additional sanctions should not be imposed for her failure to comply with the Local Rules of Practice, this Court's orders, and attend hearings on motions this Court had set. Docket No. 25. Counsel for Plaintiff violated the Court's Order by failing to serve responses to Defendant's discovery requests and by failing to file a response to the Show Cause Order by November 27.

1           **B.     Counsel for Plaintiff Has Failed to Show Good Cause.**

2           Plaintiff's untimely Response to the Show Cause Order is wholly deficient to show good  
3     cause for her failures to follow this Court's Rules and Orders, attend hearings, and communicate  
4     with Defendant's counsel Docket No 27

5           First, Plaintiff's counsel's representation that she failed to serve responses to Defendant's  
6     discovery requests because she never received them is without merit Defendant has  
7     demonstrated that the discovery requests were hand delivered to Plaintiff's counsel's office on  
8     August 2, 2007, and that Tanya Y Parker, of Plaintiff's counsel's office, received such  
9     documents Docket No 30, at Exhibit 3. Moreover, Defendant served Plaintiff with additional  
10    copies of the written discovery requests on December 3, 2007. Id at Exhibit 7 Plaintiff's  
11    counsel has made no effort to rebut Defendant's proof of delivery or offer any additional  
12    explanation for her failure to respond to the discovery in direct violation of her obligations under  
13    the Federal Rules and this Court's Order of November 16

14          Second, Plaintiff's counsel is obligated to have electronic hardware and software that will  
15    enable her to comply with this Court's Electronic Filing Procedures The Court's "Best  
16    Practices" guide for CM/ECF users specifically notes that counsel should ensure that e mail  
17    notifications are not being blocked See *Recommended Best Practices For Lawyers and Their*  
18    *Law Firms Utilizing The Nevada US District Court CM/ECF System*, at § IV(C)(3), available  
19    at <http://www.nvd.uscourts.gov/CMECFBestPractices.aspx> Further, given Plaintiff's counsel's  
20    admission that the alleged problem with her e mail system began in July 2006, her reliance on it  
21    here, and her assumption that the issue had been corrected demonstrates a complete lack of  
22    diligence Counsel for Plaintiff has failed to detail any efforts to guarantee her timely receipt of  
23    notifications from this Court notwithstanding the purported trouble with her spam filter, such as  
24    regularly checking the Court's PACER docket, regularly checking her "bulk folder," or obtaining  
25    another e mail system or provider

26          Even if the Court were to accept this explanation regarding the spam filter, which it does  
27    not, Plaintiff's counsel was clearly on notice that motions were pending before this Court  
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1 regarding the overdue written discovery and the proposed protective order given Defendant's  
2 counsel's September 21, 2007 letter which clearly stated that the Court's intervention would be  
3 sought regarding such matters, Docket No 19, Exhibit 9, and the proposed October 11 Joint  
4 Interim Status Report which specifically confirmed that such motions had been filed Docket  
5 No 30, Exhibits 4 5 These documents should have alerted Plaintiff's counsel to the purported  
6 continued trouble with her e mail account

7 Third, Plaintiff's counsel has failed to show good cause for her continued failure to attend  
8 the multiple hearings scheduled by this Court since the issuance of the November 16 Order  
9 While Plaintiff's counsel contends that an emergency concerning her mother's health arose  
10 which kept her from attending the December 11, 19, and February 6 status hearings, she has  
11 failed to provide any documentation to the Court to substantiate her oral representations or  
12 explain the circumstances This Court accepted Plaintiff's oral representation regarding such an  
13 emergency on December 11, however, the Court can no longer rely on such unsubstantiated  
14 communications given Plaintiff's counsel's failure to attend hearings on dates she has proposed  
15 and her eleventh hour notifications to the Court that she will be unable to attend Plaintiff's  
16 counsel's continued reliance on this purported emergency without some type of substantiation or  
17 additional information now appears as simply another unavailing excuse for a complete lack of  
18 diligence and attention to this matter

19 Fourth, Plaintiff's counsel's affidavit makes no attempt to explain her consistent failure  
20 to return and/or respond to the telephone calls and letters of Defendant's counsel Docket  
21 No 14, at Exhibits A B, D, Docket No 18, at Exhibits 2, 6, 8 10, Docket No 19, at Exhibits 7  
22 9, Docket No 30, at Exhibits 4 6, Docket No 34, at Exhibit 25 Defendant has shown that  
23 preceding the controversies before this Court regarding the discovery plan and scheduling order,  
24 the proposed protective order, and the written discovery requests, Defendant attempted to  
25 informally resolve each issue with numerous telephone calls and letters to Plaintiff's counsel  
26 Docket No 14, at Exhibits A B, D, Docket No 18, at Exhibits 2, 6, 8 10, Docket No 19, at  
27 Exhibits 7 9 Plaintiff's counsel has simply ignored each of these inquiries between June 28,  
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1 2007 and January 15, 2008 Id., Docket No 34, at Exhibit 25 Plaintiff's counsel's  
2 correspondence with Defendant's counsel in this matter, since the Rule 26(f) conference, has  
3 been limited to. a July 30, 2007 request for a stay to the case (in order to expand it, which  
4 Defendant promptly declined), Docket No 19, at Exhibits 5 6, a December 4, 2007 letter  
5 (unrelated to pending issues, but to which Defendant promptly replied), Docket No 34, at  
6 Exhibit 33, and two calls from Plaintiff's counsel's assistant on January 16, 2008 and January  
7 23, 2008 to advise Defendant's counsel of dates for the Order to Show Cause Hearing and to  
8 advise them that Plaintiff's discovery responses would be received on January 28, 2008 Docket  
9 34, at Exhibit 25 Plaintiff's counsel did not even contact Defendant's counsel to advise them of  
10 her inability to attend the December 11, 19, or February 6 hearings or each of the prior hearings  
11 before this Court Id This conduct, in addition to her failure to follow the Rules and Orders of  
12 this Court, has brought this matter to a stand still and caused Defendant to incur unnecessary fees  
13 and expenses

14 Plaintiff's counsel has made no effort to supplement her response to the Court's Order to  
15 Show Cause or provide any further information or documentation to excuse her conduct in this  
16 matter despite the considerable time which has passed since the Court's November 16 Order  
17 Thus, even if Plaintiff's counsel received notification of this Court's Show Cause Order on  
18 November 28, as she alleges in her affidavit, thereby requiring her to quickly file a brief and/or  
19 incomplete response, she had an additional *70 days* from that alleged notice to the February 6  
20 hearing to prepare and submit any further evidence or information supporting her contention of  
21 good cause Her failure to do so, combined with her repeated failures to attend the status hearing  
22 on this specific issue and her overall neglect of this matter for over 7 months, leaves the Court  
23 with no other choice but to conclude that good cause is wholly lacking for her conduct in this  
24 matter Moreover, such a lack of diligence in the face of such serious consequences clearly  
25 demonstrates to this Court that additional sanctions will be unavailing to move this matter  
26 forward in an efficient and proper manner

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1           **C.     Dispositive Sanctions Are Warranted.**

2           In determining whether dismissal is proper, the Court is required to weigh several factors  
3 (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its  
4 docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring disposition of  
5 cases on their merits and (5) the availability of less drastic sanctions. Henderson v. Duncan, 779  
6 F.2d 1421, 1423 (9<sup>th</sup> Cir. 1986), see also Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9<sup>th</sup> Cir.  
7 1987) (explaining the standards governing dismissal under Rules 37 and 41 "are basically the  
8 same"). The Court holds that the factors favoring dismissal outweigh the public policy favoring  
9 disposition of cases on their merits. Accordingly, this case should be dismissed with prejudice.

10           **1.     The Public's Interest in Expeditious Resolution of Litigation.**

11           This matter has been pending since May 2, 2007. Docket No. 1. But since the Rule 26(f)  
12 Conference in late June 2007, it has failed to make any progress toward resolution. Although the  
13 parties exchanged initial disclosures, no other discovery has taken place. Significantly, as of the  
14 February 6, 2008 hearing on this Court's Order to Show Cause, Plaintiff had still failed to serve  
15 any response to Defendant's first set of discovery requests—responses which are approximately  
16 six (6) months overdue. The Court was required to impose a Discovery Plan and Scheduling  
17 Order due to Plaintiff's counsel's failure to meet her obligations under the Local Rules of  
18 Practice. Yet Plaintiff and his counsel have ignored the Order and no progress was made toward  
19 completing discovery by the December 17 deadline.

20           As set forth in detail above, this matter has been at a standstill due to the conduct of  
21 Plaintiff's counsel. Therefore, the public's interest in expeditious resolution of litigation clearly  
22 favors dismissal. See Pagtalunan v. Galaza, 291 F.3d 639, 642 (9<sup>th</sup> Cir. 2002) (finding the first  
23 factor "weigh[ed] in favor of dismissal" where plaintiff failed to prosecute his case for "almost  
24 four months"), see generally Yourish v. California Amplifier, 191 F.3d 983, 990 (9<sup>th</sup> Cir. 1999)  
25 ("The public's interest in expeditious resolution of litigation always favors dismissal").  
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2. **The Court's Need to Manage Its Own Docket.**

Plaintiff's counsel's conduct has consumed judicial resources which could have been expended on other cases on the Court's docket. By ignoring Defendant's counsel's attempts to communicate with her and by failing to respond to Defendant's discovery requests, Plaintiff's counsel required the filing of three motions with this Court: the Motion to Impose Discovery Plan and Scheduling Order, the Motion to Compel and Motion for Sanctions, and the Motion for a Protective Order. Docket No(s) 14, 18, 19.

Plaintiff compounded the problems presented by each motion by failing to respond to Defendant's motions and by failing to appear for each of the hearings scheduled by the Court on these matters. Docket No(s) 16, 22, 23, 25. Plaintiff failed to respond to the Motion to Impose Scheduling Order and his counsel failed to attend the August 28, 2007 telephonic hearing without prior notice to the Court. Docket No. 16. Then, Plaintiff's counsel failed to attend the November 13, 2007 hearing scheduled on Defendant's Motion to Compel and Motion for Protective Order, again without any prior notice to the Court. Docket No. 25. As such, the Court's time was unnecessarily expended attempting to contact Plaintiff counsel's to determine whether she intended to appear.

Thereafter, Plaintiff's counsel failed to appear at the December 11, 19, and February 6, hearings on this Court's Order to Show Cause, providing no or only last minute notice that she would be unable to attend those hearings, rather than proactively attempting to reschedule the hearings. Docket No. 31, 32, 35. Plaintiff's counsel's conduct in that regard has rendered the Court unable to use the allotted time for those hearings for other matters. Because Plaintiff's counsel's dilatory conduct has halted this case and unnecessarily consumed judicial resources, it has interfered with the Court's ability to manage its docket. Therefore, this factor also favors dismissal. See also *Yourish*, 191 F.3d at 990 (plaintiff cannot cause "the action to come to a complete halt" such that the plaintiff is "control[ling] the pace of the docket rather than the Court"), *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9<sup>th</sup> Cir. 1992) (affirming dismissal and

explaining, “[i]t is incumbent upon us to preserve the district courts power to manage their dockets without being subject to the endless vexatious noncompliance of litigants like Ferdik”) As the Ninth Circuit Court has found “Indulgent toleration for the misconduct of lawyers and litigants is a luxury the overcrowded federal courts cannot afford” Chism v Nat'l Heritage Life Ins Co, 637 F.2d 1328, 1332 (9<sup>th</sup> Cir 1981) (citations omitted), *overruled on other grounds by* Bryant v Ford Motor Co., 844 F.2d 602 (9<sup>th</sup> Cir 1987) Instead, “[f]airness to other litigants, whether in the same case or merely in the same court (as competitors for scarce judicial resources),” requires the Court to use dispositive sanctions when faced with conduct such as that shown here by Plaintiff's counsel See id

### 3. The Risk of Prejudice to Defendant Favors Dismissal.

In determining whether prejudice has occurred, the Ninth Circuit Court “examine[s] whether the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case” Malone, 833 F.2d at 131 Unreasonable delay will result in a presumption of prejudice Anderson v. Air West, Inc, 542 F.2d 522, 524 (9<sup>th</sup> Cir 1976) (“The law presumes injury from unreasonable delay”), Laurino v Syringa Gen Hosp., 279 F.3d 750, 753 (9<sup>th</sup> Cir 1992) (a presumption of prejudice arises from a Plaintiff's unexplained failure to prosecute) A plaintiff may rebut the presumption of prejudice by offering a non frivolous explanation for the delay, in which case the burden shifts to the defendant to show “at least some actual prejudice” Nealey v Transportation Maritime Mexicana, S.A., 662 F.2d 1275, 1281 (9<sup>th</sup> Cir 1980) In doing so, Plaintiff “must . . . persuade the court that such claims of prejudice are either illusory or relatively insignificant when compared to the force of his excuse,” and then “the court must exercise its discretion by weighing the relevant factors time, excuse, and prejudice” Id

Here, Defendant is entitled to a presumption of prejudice due to Plaintiff's unreasonable 7 month delay and failure to prosecute this matter This matter has come to a complete stand

1 still during a time period in which the parties were required, by the Rules and the Court's  
2 Scheduling Order, to be conducting discovery to prepare for dispositive motions and/or trial

3 "The period of time constituting unreasonable delay need not be extensive if 'the future  
4 [holds] only the prospect of continued improprieties.'" Harrison v. Health Net Health Plan of  
5 Oregon, No. CV 02 1320 HA, 2005 WL 465132, at \*2 (D. Ore., Feb. 28, 2005) (quoting Chism,  
6 637 F.2d at 1332, *overruled on other grounds by* Bryant v. Ford Motor Co., 844 F.2d 607 (9<sup>th</sup>  
7 Cir. 1987)). Plaintiff's continued dilatory conduct after this Court's November 16 Order, her  
8 continued failure to attend hearings scheduled based upon her representations of availability, and  
9 her inexplicable and complete failure to respond to Defendant's counsel's telephone calls and  
10 letters from June 28, 2007 through January 15, 2008, demonstrates that this matter will continue  
11 to be fraught with dilatory conduct and unreasonable delay. Indeed, despite their pendency since  
12 *August 2007* and the Court's Order compelling answers to Defendant's discovery requests by  
13 *November 27*, the first time Plaintiff's counsel contacted Defendant's counsel regarding such  
14 requests was *January 23, 2008*, when her assistant promised delivery of responses by Monday,  
15 January 28. Yet, no discovery responses were received on January 28, and Plaintiff's counsel  
16 made no attempt to contact Defendant's counsel. See Docket No. 34, at Exhibit 25.

17 Plaintiff's counsel cannot credibly rebut this presumption because, as set forth above, her  
18 excuses are unavailing to explain her complete absence from this matter for over seven (7)  
19 months and her failure to follow this Court's Rules and Orders. See Yourish, 191 F.3d at 991-92  
20 (finding that the prejudice factor "strongly favors dismissal" as "Plaintiffs' paltry excuse for his  
21 default on the judge's order indicates that there was sufficient prejudice to Defendants from the  
22 delay"), Malone, 833 F.2d at 131 (in holding that "the prejudice to the Government from  
23 Malone's actions was sufficient to justify an order of dismissal," the court placed "particular  
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1 reliance on the district courts determination that Malone's excuse for her conduct was  
2 groundless"), see also Hernandez, 138 F 3d at 400 01 (finding the third factor "weighs in favor  
3 of dismissal regardless of whether the defendants have shown any actual prejudice" because,  
4 while the presumption of prejudice is rebuttable, "the plaintiffs have yet to present 'an excuse for  
5 delay that is anything but frivolous'"), Pagtalunan, 291 F 3d at 643 (unnecessary delay  
6 unreasonable where plaintiff offered no explanation of h's efforts to proceed) Even Plaintiff's  
7 counsel's recent excuse regarding her mother's health is ineffective inasmuch as her failure to  
8 prosecute this matter and failure to follow the Rules and Orders of this Court began well before  
9 this purported emergency Plaintiff's counsel failed to attend both the August 28 hearing  
10 regarding the Scheduling Order and the November 13 hearing on the Motion to Compel and  
11 Motion for Protective Order, Defendant's discovery responses have been overdue since  
12 September 4, and Plaintiff's counsel stopped communicating with Defendant's counsel in late  
13 June 2007 See Harrington v. City of Chicago, 433 F 3d 542, 547 48 (7<sup>th</sup> Cir 2006) (failure of  
14 plaintiffs' attorney to respond to discovery could not be excused by the death of his sister and  
15 father during pendency of action because even before the deaths attorney did not respond to  
16 discovery requests and failed to make an appearance in court), Cintron-Lorenzo v. Departamento  
17 de Asuntos del Consumidor, 312 F 3d 522, 527 28 (1<sup>st</sup> Cir 2002) (explaining how plaintiff's  
18 "duty of attending to the case is not automatically excused by personal tragedy or emotional  
19 upheaval," and affirming dismissal because "[e]ven taking [plaintiff's] description of her  
20 afflictions at face value, nothing about them excuses this persistent failure to communicate" with  
21 the court in an effort "to seek judicial approval for her repeated noncompliance with procedural  
22 rules, court orders, and a series of deadlines")

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26 Nevertheless, even if Plaintiff's counsel could offer some valid excuse for her failures,  
27 Defendant has shown actual prejudice Defendant has incurred unnecessary expenses and fees  
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1 due to Plaintiff's absence from this case.<sup>1</sup> Rather than expending resources on conducting  
2 discovery and moving this matter toward resolution, Defendant has been required to expend its  
3 resources upon repeated and unsuccessful attempts to communicate with Plaintiff's counsel  
4 regarding routine matters, motions on issues which the parties should have been able to resolve  
5 themselves, notices of no opposition when Plaintiff failed to respond to motions, a response to  
6 Plaintiff's affidavit on the show cause order, and preparation for and attendance at hearings  
7 which Plaintiff's counsel failed to attend without sufficient notice. Such unnecessary time and  
8 expense is sufficient to demonstrate actual prejudice. See Chism, 637 F.2d at 1331 (affirming  
9 dismissal where plaintiff's "[d]isregard of the discovery process deprived the defendant of  
10 needed information, increased its litigation expenses and forestalled its preparation for trial"),  
11 Scarborough v. Eubanks, 747 F.2d 871, 876 (3d Cir. 1984) (prejudice includes "irremediable  
12 burdens or costs imposed on the opposing party"); Hopkins v. J.C. Penney Co. 227 F.R.D. 347,  
13 352-53 (D. Kan. 2004) (finding substantial prejudice where plaintiff's failure to file Rule 26  
14 disclosures, to respond to written discovery, to communicate with defendant's counsel, and to  
15 provide relevant documents to defendant "has left defendant largely in the dark" and recognizing  
16 that "defendant has expended great effort in calling, faxing and e-mailing plaintiff about  
17 discovery matters even after the court granted defendant's motion to compel").<sup>2</sup>

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19 Moreover, due to Plaintiff's counsel's conduct, Defendant was unable to conduct any  
20 discovery on Plaintiff's claims before the December 17, 2007 expiration of the time period that

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23 <sup>1</sup>Indeed, Defendant asserts in its Motion to Dismiss that overall Plaintiff's failure to participate in  
24 this case has caused Defendant to incur approximately \$33,779.00 in attorney's fees and  
25 expenses. See Docket No. 34 at Exhibit 25 at ¶¶ 17-19.

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27 <sup>2</sup>See also Harrison v. Health Net Health Plan of Oregon, No. CV 02-1320 HA, 2005 WL 465132,  
28 at \*2 (D. Ore., Feb. 28, 2005) (finding actual prejudice, in part because "plaintiff's dereliction"  
has caused defendant to incur "considerable costs and fees"), Daniels v. San Fran. Sch. Dist., No.  
C 98 4068 TEH, 2001 WL 277976, at \*5 (N.D. Cal., March 20, 2001) (finding prejudice where,  
in part, defendant "incurred considerable expenses in legal fees and wasted time appearing at  
conferences when Plaintiff has not prepared or has failed to appear")

1 the Court ordered for the completion of discovery. Finally, because of the extensive delay to this  
2 action caused by Plaintiff's counsel's conduct, Defendant's ability to defend this action, which  
3 involves allegations of discrimination dating back to 2004, has been hampered given the  
4 potential resulting challenges to discovery, including the fading of memories of key witnesses.  
5 As such, the prejudice to Defendant favors dismissal.

6 **4. The Availability of Less Drastic Sanctions Favors Dismissal.**

7 This Court has already implemented alternative sanctions in an attempt to remedy  
8 Plaintiff's delay and failures. The Court entered a Scheduling Order for the parties when  
9 Plaintiff refused to confer with Defendant about this matter. Docket No. 17. The Court granted  
10 Defendant's Motion to Compel and Motion for Protective Order and ordered Plaintiff to provide  
11 answers to Defendant's discovery requests by November 27. The Court also issued monetary  
12 sanctions against Plaintiff, \$2,000.00, for the failure to respond to those discovery requests. In  
13 that Order, the Court specifically found that the Plaintiff had repeatedly failed to comply with the  
14 Rules and Orders of the Court and thereby determined that Plaintiff must show cause why  
15 additional sanctions were not warranted. The Court clearly warned that "[f]ailure to timely  
16 comply with the provisions of this order may result in the imposition of sanctions up to and  
17 including case dispositive sanctions." Docket No. 25.

18 Yet, none of these actions led Plaintiff's counsel to comply with her obligations under the  
19 Rules and this Court's Orders. Plaintiff's counsel failed to timely respond to the Court's Order  
20 to Show Cause, failed to serve responses to Defendant's discovery requests, and failed to attend  
21 the December 11 or 19 status hearing. Due to her representations of a personal emergency on  
22 December 11 and 19, the Court imposed a thirty (30) day stay to this matter to afford counsel  
23 with time to attend to her mother's health. Even this remedy had no effect on Plaintiff's counsel.  
24 She failed to serve the discovery responses and did not appear for the February 6 hearing, after  
25 specifically representing that she was available on that date.  
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The Court's repeated attempts to explore other possible and meaningful alternatives to dismissal have been to no avail. There are no other less drastic sanctions available that would ensure compliance by Plaintiff's counsel if this case were allowed to move forward. Consequently dismissal is appropriate. See Adriana Intern Corp. v. Thceren, 913 F.2d 1406, 1413 (9<sup>th</sup> Cir. 1990) (holding the court "satisfied the consideration of alternatives requirement [] by imposing various other sanctions before dismissal," such as monetary sanctions, warnings, and contempt, and thus dismissal was appropriate when plaintiff "had not complied with past sanctions" and "continually disobeyed court orders and acted in willful disruption of the discovery process," giving the court "no reason to believe they would [comply] in the future"), Henderson, 779 F.2d at 1424 (finding that "plaintiff's counsel disregarded repeatedly the deadlines set by the district court," that "the history of counsel's actions in the district court forecloses any assumption that a new extension would be fruitful," and that the district court's warnings of possible dismissal, holding of a status conference, and establishing of a schedule for discovery, "as a constructive intermediate step in dealing with dilatory practices," constituted sufficiently meaningful "alternative measures" to dismissal).

**5. The Public Policy Favoring Disposition of Cases on Their Merits Is Outweighed by the Other Factors.**

This factor is clearly overcome by the other four factors which each strongly favor dismissal. See Rio Properties, Inc. v. Rio Intern Interlink, 284 F.3d 1007, 1022 (9<sup>th</sup> Cir. 2002) ("While the public policy favoring disposition of cases on their merits weighs against default judgment, that single factor is not enough to preclude imposition of this sanction when the other four factors weigh in its favor").

Finally, the Court acknowledges that dismissal of this action for the conduct of Plaintiff's counsel imposes a hardship upon the Plaintiff which this Court regrets. Nevertheless, Plaintiff made a voluntary choice to engage the counsel of his choosing, and this Court simply cannot effectively function unless it requires all who come before it to comply with the same Rules.

1 See Chism, 637 F.2d at 1332 (“district courts cannot function efficiently unless they can  
2 effectively require compliance with reasonable rules. Absence of meaningful power to require  
3 that compliance would make for disorder and preclude effective judicial administration at the trial  
4 court level”), Link, 370 U.S. at 633-34 (explaining that refraining from dismissal where the  
5 plaintiff’s counsel, rather than the plaintiff, is responsible for the conduct at issue “would be  
6 wholly inconsistent with our system of representative litigation, in which each party is deemed  
7 bound by the acts of his lawyer agent and is considered to have ‘notice of all facts, notice of  
8 which can be charged upon the attorney’”) (quoting Smith v. Ayer, 101 U.S. 320, 326 (October  
9 Term 1879)).

11 **IT IS THE RECOMMENDATION** of the undersigned Magistrate Judge that case  
12 dispositive sanctions be imposed and that this matter be dismissed with prejudice due to  
13 Plaintiff’s counsel’s failures to comply with Court orders, failures to comply with discovery  
14 obligations, the Federal Rules of Civil Procedure, and the Local Rules of Practice, failures to  
15 appear at multiple Court ordered proceedings before the Court, and failures to communicate with  
16 opposing counsel.

17 DATED this 29th day of February 2008

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21 PEGGY A. LEEN  
22 UNITED STATES MAGISTRATE JUDGE  
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